

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

HÉCTOR REYES-MARTÍNEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL 07-1639 (JAG)
(CRIMINAL 03-0083 (JAG))

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter comes before the court on Petitioner Héctor Reyes-Martínez' (hereinafter "Reyes-Martínez") motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (Docket No. 1-2.) Reyes-Martínez sets forth two arguments in support of his motion: first, Reyes-Martínez contends that his counsel, both at trial and on appeal, rendered ineffective assistance. (*Id.* at 7-14.) Reyes-Martínez argues that trial counsel failed to (a) provide Reyes-Martínez with discovery; (b) advise Reyes-Martínez of the benefit of an open plea, which he argues would have preserved the issue of drug quantities for future proceedings; (c) properly litigate Reyes-Martínez' pro se informative motion and motion to withdraw; and (d) "preserve any Blakely issues." (*Id.* at 13-14.) Reyes-Martínez argues appellate counsel should have argued that (1) trial counsel rendered ineffective assistance and (2) Reyes-Martínez' sentence is illegal under Apprendi and its progeny. (*Id.* at 7.)

Second, Reyes-Martínez contends his guilty plea was involuntary and unintelligent because he was not informed by his trial counsel that he did not have to stipulate to the drug quantities in the plea agreement and could, through an open plea, move for an evidentiary hearing to determine such. (*Id.* at 20-21.)

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4 On November 6, 2007, the government filed its opposition to Reyes-
5 Martínez' section 2255 motion, asserting that Reyes-Martínez' "allegations are
6 refuted by the files and records of the case" and his petition should be "summarily
7 denied." (Docket No. 6, at 2.)

8 On December 10, 2007, in his reply to the government's opposition to his
9 section 2255 motion, Reyes-Martínez moved for an evidentiary hearing to
10 determine the drug quantities for which he should be held responsible. (Docket
11 No. 11.) Having considered the arguments of the parties and for the reasons set
12 forth below, petitioner Reyes-Martínez' motion to vacate, set aside, or correct
13 sentence is DENIED.

14 I. FACTUAL AND PROCEDURAL BACKGROUND

15 On March 14, 2003, Reyes-Martínez and sixteen co-defendants were
16 charged by a Federal Grand Jury with a two-count indictment in the District of
17 Puerto Rico. (Criminal 03-0083, Docket No. 2.) Count one charged the
18 defendants with conspiring to possess with intent to distribute one (1) kilogram or
19 more of heroin, multiple kilograms of marijuana, and five (5) or more kilograms
20 of cocaine, in violation of 21 U.S.C. §§ 841(a) and 846. (Id. at 3.) Count two
21 charged the defendants with aiding and abetting in the knowing and intentional
22 possession of firearms in furtherance of the drug trafficking conspiracy, as defined
23 in 18 U.S.C. § 921(a)(3) and in violation of 18 U.S.C. §§ 924(c)(1) and (2). (Id.
24 at 11.)

25 On March 1, 2004, Reyes-Martínez pled guilty to both counts pursuant to a
26 plea agreement. (Criminal 03-0083, Docket Nos. 299 & 303.) According to the
27 plea agreement, both parties agreed that Reyes-Martínez was responsible for at
28 least ten (10), but not more than thirty (30), kilograms of heroin, establishing a

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4 base-level offense of thirty-six (36) for count one of the indictment under U.S.S.G.
5 § 2D1.1(c)(2). (Criminal 03-0083, Docket No. 303, at 4.) Both parties agreed
6 that a three-level downward adjustment under section 3E1.1 was appropriate due
7 to Reyes-Martínez' acceptance of responsibility. (Id. at 5.)

8 The plea agreement explained that with a base-level offense of thirty-three
9 (33) and a Criminal History Category of III, Reyes-Martínez' sentencing guideline
10 range fell between one-hundred sixty-eight (168) and two-hundred ten (210)
11 months imprisonment. (Id.) The government agreed to a sentence of one-
12 hundred eighty (180) months and Reyes-Martínez reserved the right to argue for
13 a sentence at the lower end of the guideline range. (Id.)

14 The plea agreement also explained that, as to count two of the indictment,
15 Reyes-Martínez was required to serve a mandatory minimum of sixty (60) months
16 consecutive to the sentence imposed for count one. (Id. at 6.) Thus, the total
17 sentence recommended by the government was two-hundred forty (240) months.
18 (Id.)

19 On March 19, 2004, Reyes-Martínez filed a pro se informative motion in
20 Spanish, wherein he objected to the drug quantities attributed to him in the plea
21 agreement. (Criminal 03-0083, Docket No. 329, at 1.) Reyes-Martínez argued
22 there were drug quantities attributed to him from the time before he joined the
23 conspiracy, in violation of U.S.S.G. § 1B1.3. (Id.) Reyes-Martínez argued he was
24 in custody or under supervised release for most of the duration of the conspiracy
25 and therefore unable to participate in it. (Id.) Reyes-Martínez argued that, under
26 section 2D1.1, he should have been given an evidentiary hearing to determine the
27 drug quantities for which he was responsible. (Id.) This pro se motion was
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3 referred to Reyes-Martínez' trial counsel for further action. (Criminal 03-0083,
4 Docket No. 333.)

5 On June 7, 2004, Reyes-Martínez filed a pro se motion in Spanish to
6 withdraw his guilty plea. (Criminal 03-0083, Docket No. 368.) In this motion
7 Reyes-Martínez expressed that, although he had intelligently and voluntarily
8 submitted to the plea agreement, he felt pressured to do so because he was afraid
9 that the co-defendants in the case would testify against him. (Id. at 1.) Reyes-
10 Martínez also expressed that his trial counsel, attorney Ignacio Rivera-Cordero
11 (hereinafter "Rivera-Cordero"), did not provide him with the kind of legal
12 representation he deserved. (Id. at 2.)

13 On June 9, 2004, Reyes-Martínez' motion to withdraw his guilty plea was
14 denied and referred to counsel for further action. (Criminal 03-0083, Docket No.
15 371.)

16 On June 25, 2004, a sentencing hearing was held and Reyes-Martínez was
17 sentenced to one-hundred seventy-four (174) months imprisonment to be served
18 consecutively to the mandatory minimum of sixty (60) months for count two
19 (Criminal 03-0083, Docket No. 391), for a total of two-hundred thirty-four (234)
20 months. Judgment was entered June 29, 2004 (Criminal 03-0083, Docket No.
21 392), and Reyes-Martínez filed a timely notice of appeal. (Criminal 03-0083,
22 Docket No. 395 & 397.)

23 On April 21, 2005, Reyes-Martínez, through appellate counsel, attorney
24 Johnny Rivera-González (hereinafter "Rivera-González"), argued that "the district
25 court committed reversible error when it failed to entertain [Reyes-Martínez']
26 motion to withdraw his guilty plea as well as to consider whether there was a
27 conflict of interest between his [trial] counsel and him, which interfered with
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3 [Reyes-Martínez'] Sixth Amendment right to counsel." (Appeal No. 04-1991,
4 Appellant's Br. 15.)

5 On March 9, 2005, Reyes-Martínez, through his appellate counsel, filed a
6 motion requesting leave to move for summary remand to withdraw the plea or for
7 re-sentencing in the alternative. (Civil 07-1639, Docket No. 1-3, at 51; Appeal
8 No. 04-1991, Appellant's Mot., Mar. 9, 2005.) In this motion, Rivera-González
9 argued that Reyes-Martínez should either be allowed to withdraw his guilty plea
10 or be re-sentenced in light of the fact that the sentencing guidelines had been
11 made advisory under United States v. Booker, 543 U.S. 220 (2005). (*Id.*)

12 On April 4, 2006, Reyes-Martínez' conviction and sentence were affirmed by
13 the First Circuit, United States v. Martínez, No. 04-1991 (1st Cir. April 4, 2006)
14 (unpublished), and on October 2, 2006, the Supreme Court denied certiorari.
15 Reyes-Martínez v. United States, 127 S. Ct. 196 (2006). In affirming Reyes-
16 Martínez' conviction, the First Circuit noted that Reyes-Martínez' pro se motion to
17 withdraw his plea "contained a bare, isolated accusation that his attorney did not
18 render 'proper legal representation.'" (Criminal 03-0083, Docket No. 665, at 2.)
19 The First Circuit noted that Reyes-Martínez' "allegation of defective legal
20 assistance was belied by the representation of satisfaction with counsel that he
21 made under oath during the change-of-plea colloquy and, subsequently, by his
22 thanks to counsel at sentencing." (*Id.*)

23 On July 17, 2007, Reyes-Martínez filed the instant section 2255 motion.
24 (Civil 07-1639, Docket No. 1-2.) Reyes-Martínez argues that (A) he "was denied
25 rights guaranteed to him by the Sixth Amendment of the United States
26 Constitution to the effective assistance of counsel in his criminal proceedings from
27 2004 to 2006," (*id.* at 7), that is, that both his trial counsel, Rivera-Cordero, and
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3 appellate counsel, Rivera-González, rendered ineffective assistance (Docket No.
4 1-2, at 7-18); and (B) his "lack of understanding of the Due Process requirements
5 makes his waiver an unintelligent, involuntary waiver, which must be set aside."
6 (Id. at 24).

7 8 II. DISCUSSION

9 Under 28 U.S.C. § 2255 a petitioner may claim "the right to be released
10 upon the ground that the sentence was imposed in violation of the Constitution
11 or laws of the United States" 28 U.S.C. § 2255(a).

12 A. Ineffective Assistance of Counsel

13 "In all criminal prosecutions, the accused shall enjoy the right to . . . the
14 Assistance of Counsel for his defense." U.S. Const. amend. 6. "[T]he right to
15 counsel is the right to the effective assistance of counsel." Strickland v.
16 Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S.
17 759, 771 n.14 (1970)). However, "the 'Sixth Amendment guarantees reasonable
18 competence, not perfect advocacy judged with the benefit of hindsight.'" Sleeper
19 v. Spencer, 510 F.3d 32, 38 (1st Cir. 2007) (quoting Yarborough v. Gentry, 540
20 U.S. 1, 8 (2003)). Therefore, to prove ineffective assistance of counsel, a
21 defendant must show that (1) "counsel's representation fell below an objective
22 standard of reasonableness," and (2) that "the deficient performance prejudiced
23 his defense." Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007) (quoting
24 Strickland v. Washington, 466 U.S. at 687-88). The defendant bears the burden
25 of proof on both tiers of the test. Cirilo-Muñoz v. United States, 404 F.3d 527,
26 530 (1st Cir. 2005) (citing Scarpa v. Dubois, 38 F.3d 1, 8-9 (1st Cir. 1994)).
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4 Reyes-Martínez alleges that both his trial and appellate counsel rendered
5 ineffective assistance of counsel during his criminal proceedings. (Docket No. 1-2
6 at 7, 10.)

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8 1. Trial Counsel

9 Reyes-Martínez argues trial counsel rendered ineffective assistance of
10 counsel because he failed to: (a) provide Reyes-Martínez with discovery; (b)
11 advise Reyes-Martínez of the benefit of an open plea, which he argues would have
12 preserved the issue of drug quantities for future proceedings; (c) properly litigate
13 Reyes-Martínez' pro se informative motion and motion to withdraw; and (d)
14 "preserve any Blakely issues." (Docket 1-2, at 13-14.)

15 a. Discovery

16 Reyes-Martínez alleges that when he asked attorney Rivera-Cordero about
17 discovery, the counselor's response was "there was no discovery." (Docket No.
18 1-2, at 8.) However, Reyes-Martínez has presented no evidence to show or infer
19 that Rivera-Cordero ever made such a statement.

20 The government submits that it turned over six discovery packages to
21 Reyes-Martínez' trial counsel. (Docket No. 6, at 9.)

22 According to Reyes-Martínez, Rivera-Cordero allegedly told him that he
23 should consider the plea agreement because "if one looses [sic] you all will loose
24 [sic]." (Docket No. 1-2, at 8.) As Reyes-Martínez points out, three co-defendants
25 proceeded to trial, were convicted, and sentenced to thirty-five (35), forty-five
26 (45), and fifty-five (55) years imprisonment. (*Id.* at n.2.)

27 Even assuming Rivera-Cordero reviewed the discovery but then told Reyes-
28 Martínez there was no discovery, Reyes-Martínez has not shown how this
prejudiced his defense: Reyes-Martínez still received the benefit of the plea

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3 agreement Rivera-Cordero negotiated from the information received through
4 discovery.

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6 b. Open Plea

7 First, as with the "no discovery" allegation, Reyes-Martínez has produced no
8 evidence to show or infer that Rivera-Cordero did not explain to him the option
9 to entertain an open plea.

10 Second, Reyes-Martínez has not shown that not being given the option to
11 entertain an open plea somehow prejudiced his defense. Reyes-Martínez argues
12 he was prejudiced by not being given the chance to an open plea because the
13 issue of drug quantities could have been preserved for appeal. But Reyes-
14 Martínez cites no case law for this proposition and does not set forth exactly how
15 such an issue could be preserved for review. Arguments such as this, developed
16 in a perfunctory manner, are deemed waived. Alan Corp. v. Int'l Surplus Ins. Co.,
17 22 F.3d 339, 343 (1st Cir. 1994).

18 Third, it can easily be inferred that Rivera-Cordero saw the evidence
19 presented to him in discovery and thought a plea agreement would be in Reyes-
20 Martínez' best interests. If Reyes-Martínez had been left to the vagaries of an
21 open plea –which may have given Reyes-Martínez the right to an evidentiary
22 hearing but no guarantee to a recommended sentence from the government–
23 then Reyes-Martínez likely would have been exposed to a much higher sentence
24 than what Rivera-Cordero negotiated.

25 c. Pro Se Motions

26 Reyes-Martínez alleges that his trial counsel's failure to litigate his pro se
27 motions constituted ineffective assistance of counsel. However, "[t]o avoid the
28 shoals of ineffective assistance, an attorney's judgment need not necessarily be

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3 right, so long as it is reasonable.” United States v. McGill, 11 F.3d 223, 227 (1st
4 Cir. 1993). Moreover, an attorney’s decision “not to abide by the wishes of his
5 client has no necessary bearing on the question of professional competence[,]
6 [and] in some instances, listening to the client rather than to the dictates of
7 professional judgment may itself constitute incompetence.” Id. Therefore,
8 Rivera-Cordero’s decision not to litigate Reyes-Martínez’ pro se motions do not
9 amount to ineffective assistance of counsel.

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11 Even if such a decision could be deemed unreasonable, Reyes-Martínez has
12 not shown how such action prejudiced his defense, insofar as he has not shown
13 any possibility of success on those motions.

14 d. Blakely

15 Reyes-Martínez argues his trial counsel rendered ineffective assistance
16 because he failed to preserve any Blakely issues for appeal. However, Reyes-
17 Martínez’ sentence in no way violates the mandate of Apprendi and its progeny.

18 In Apprendi v. New Jersey, the Supreme Court held that “[o]ther than the
19 fact of a prior conviction, any fact that increases the penalty for a crime beyond
20 the prescribed statutory maximum must be submitted to a jury, and proved
21 beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
22 Then, in Blakely v. Washington, the Supreme Court extended Apprendi, holding
23 that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence
24 a judge may impose *solely on the basis of the facts reflected in the jury verdict*
25 *or admitted by the defendant.*” Blakely v. Washington, 542 U.S. 296, 303 (2004)
26 (emphasis in original). In United States v. Booker, the Supreme Court held that,
27 similar to the state sentencing schemes in Apprendi and Blakely, the Federal
28 Sentencing Guidelines implicate the Sixth Amendment and struck down the

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4 section which made the Guidelines mandatory. United States v. Booker, 543 U.S.
5 220, 233-37 (2005).

6 At the Rule 11 change of plea colloquy, Reyes-Martínez, agreed with the
7 government's stipulation that he had handled between ten (10) and thirty (30)
8 kilograms of heroin and brandished a weapon in the process.

9 "[T]he presumption of truthfulness of the Rule 11 statements will not be
10 overcome unless the allegations in the § 2255 motion are sufficient to state a
11 claim of ineffective assistance of counsel and include credible, valid reasons why
12 a departure from those earlier contradictory statements is now justified." United
13 States v. Butt, 731 F.2d 75, 80 (1st Cir. 1984).

14 Reyes-Martínez has failed to show a reason why his statements at the Rule
15 11 plea colloquy should not be accepted as truth. By signing on to the plea
16 agreement and following through with the plea colloquy, Reyes-Martínez admitted
17 to the facts in that agreement.

18 Reyes-Martínez' admissions to possessing with intent to distribute heroin
19 and brandishing a weapon in the process, along with his acceptance of
20 responsibility, led to Reyes-Martínez being sentenced to one-hundred seventy-four
21 months (174) imprisonment. This sentence falls at the very bottom end of the
22 sentencing guideline range established by the guidelines; the maximum sentence
23 provided by statute in Reyes-Martínez' case was life imprisonment. See 21 U.S.C.
24 § 841.

25 Reyes-Martínez' sentence was neither above the guideline range, nor the
26 statutory maximum, and no other facts were even found by the judge in this case.
27 Therefore, Reyes-Martínez' sentence in no way violates the mandate of Apprendi
28 and its progeny.

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4 2. Appellate Counsel

5 Reyes-Martínez argues his appellate counsel rendered ineffective assistance
6 because he raised “hopeless” arguments and did not tackle the “real issues.”
7 (Docket No. 1-2, at 11.) Reyes-Martínez argues that appellate counsel should
8 have argued that (1) trial counsel rendered ineffective assistance and (2) Reyes-
9 Martínez’ sentence is illegal under Apprendi and its progeny. (Id. at 11-12.)

10 First and foremost, “[a]ppellate counsel is not required to raise every
11 non-frivolous claim, but rather select[] among them to maximize the likelihood of
12 success on the merits.” Lattimore v. Dubois, 311 F.3d 46, 57 (1st Cir. 2002)
13 (citing Smith v. Robbins, 528 U.S. 259, 288 (2000)). Therefore, what Reyes-
14 Martínez perceives would have been the better argument on appeal, especially in
15 retrospect, does not make for an ineffective assistance of counsel claim.

16 Second, ineffective assistance of counsel claims “must originally be
17 presented to the district court’ as a collateral attack under 28 U.S.C. § 2255.”
18 United States v. Colón-Torres, 382 F.3d 76, 84-85 (1st Cir. 2004) (quoting United
19 States v. Ovalle-Márquez, 36 F.3d, 212, 221 (1st Cir. 1994) (quoting United
20 States v. Hunnewell, 891 F.2d 955, 956 (1st Cir.1989)). Therefore, appellate
21 counsel’s failure to include an ineffective assistance claim against trial counsel on
22 appeal does not make for an ineffective assistance of counsel claim against
23 appellate counsel.

24 Third, Reyes-Martínez’ argument that appellate counsel rendered ineffective
25 assistance because he did not argue that Reyes-Martínez’ sentence is illegal under
26 Apprendi and its progeny is contradicted by the record: on March 9, 2005,
27 appellate counsel filed a motion arguing that Reyes-Martínez’ sentence should be
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4 vacated in light of the Supreme Court's ruling in United States v. Booker, 543 U.S.
5 220 (2005).

6 Therefore, this aspect of Reyes-Martínez' ineffective assistance of counsel
7 claim must fail.

8 B. Involuntary and Unintelligent Change of Plea

9 Reyes-Martínez also argues he should be allowed to withdraw his guilty plea
10 because his trial counsel did not inform him he could challenge the drug quantities
11 stipulated to in the plea agreement, making his plea involuntary and unintelligent.

12 A defendant does not have an absolute right to withdraw a guilty plea but
13 instead has the burden of showing there is a fair and just reason to withdraw his
14 plea before sentencing. United States v. Marrero-Rivera, 124 F.3d 342, 347 (1st
15 Cir. 1997). In considering such a request, the most important factor to consider
16 is whether the plea was knowing and voluntary within the meaning of Federal Rule
17 of Criminal Procedure 11. United States v. Isom, 85 F.3d 831, 834 (1st Cir.
18 1996). The defendant bears the burden of showing a fair and just reason. Id.

19 A court must review the transcripts of a plea colloquy with an eye toward
20 three "core concerns": (1) absence of coercion; (2) that the defendant
21 understands of the charges; and (3) the defendant understands the consequences
22 of the guilty plea. United States v. Isom, 85 F.3d at 835 (quoting United States
23 v. Gray, 63 F.3d 57, 60 (1st Cir. 1995)).

24 The plea colloquy at the change of plea hearing establishes that these three
25 concerns were met. Not only did the court ask defendants Reyes-Martínez and
26 Mateo-Espada if they understood their rights, the consequences of pleading guilty
27 (Docket No. 1-3, Tr. of Change of Plea Hearing), and whether they were coerced
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3 into such a plea (*id.* 15.), but the court asked the defendants no fewer than three
4 times if they were guilty of the crimes in the indictment. (*Id.* at 21-22.)

5 The defendants answered all these questions in the affirmative. Therefore,
6 Reyes-Martínez' plea was knowing and voluntary, and it should not be withdrawn.

7
8 III. CONCLUSION

9 In view of the above, I find that Reyes-Martínez has not met the burden of
10 proof of showing that his trial and appellate counsel rendered ineffective
11 assistance of counsel. Furthermore, Reyes-Martínez has not shown that his guilty
12 plea was intelligent and involuntary. Therefore, it is my recommendation that
13 petitioner Héctor Reyes-Martínez' motion to vacate, set aside or correct his
14 sentence under 28 U.S.C. § 2255 should be DENIED.

15 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
16 party who objects to this report and recommendation must file a written objection
17 thereto with the Clerk of this Court within ten (10) days of the party's receipt of
18 this report and recommendation. The written objections must specifically identify
19 the portion of the recommendation, or report to which objection is made and the
20 basis for such objections. Failure to comply with this rule precludes further
21 appellate review. See *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Davet v.*
22 *Maccorone*, 973 F.2d 22, 30-31 (1st Cir. 1992); *Paterson-Leitch Co. v. Mass. Mun.*
23 *Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988); *Borden v. Sec'y of Health &*
24 *Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987); *Scott v. Schweiker*, 702 F.2d 13, 14
25 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-79 (1st Cir. 1982);
26 *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980).

27 At San Juan, Puerto Rico, this 3rd day of April, 2008.

28 S/ JUSTO ARENAS
Chief United States Magistrate Judge